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[From *The Congressional Record*, October 29, 1913]

Wednesday, October 29, 1913

Mr. SIMS. Mr. Speaker, under the leave granted to me to extend my remarks in the RECORD I include an article, by Henry Herzberg, which is published in the *Baltimore Evening Sun* of October 15, 1913. The article is as follows:

[From the *Baltimore Evening Sun*, Wednesday, October 15, 1913]

THE A B C OF THE PANAMA CANAL TOLLS CONTROVERSY

(By Henry Herzberg)

The refusal of England to participate in the Panama-Pacific Exposition to be held at San Francisco once more excites public interest in the pending issues between Great Britain and the United States.

The primal question involved in the present controversy with Great Britain is not concerned with the elementary right of the United States to grant a subsidy to its own vessels or whether the United States is estopped from regulating its domestic commerce.

The dispute rests upon the pivot whether the Panama Canal act of August, 1912, impinges upon the rights of Great Britain and other nations in respect to the use of the canal as stipulated in our treaties.

The regulation of tolls and the conditions governing traffic through the canal is not a political or an economic problem of domestic origin which only indirectly affects foreign nations; but, on the contrary, it is an international controversy developed from our control of the canal property, the titular sovereignty of which still inheres in Panama; and while the question presented is abstractly a purely economic one, yet its settlement depends upon the interpretation of treaty rights and obligations.

Are we unmindful of the fact that the actual building of the canal was conditioned upon England's surrender of a valuable privilege?

In his masterly presentation of this subject in the Senate, Senator Root, with learning and candor, penetrated the very fiber of the present dispute. He showed the evolution of the building of the canal by tracing the origin of our various treaties bearing upon trans-Isthmian communication. In his analysis Senator Root pointed out the fact that when the United States turned its attention to the possibilities of a ship canal it found Great Britain held the place of vantage or practically controlled the eastern end of the Nicaragua route, upon which all minds were concentrated. The United States then sought a treaty with Great Britain by which England would renounce the advantage she had acquired and admit the United States to

equal participation with her in the control and protection of a canal across the Isthmus. From these negotiations there arose the Clayton-Bulwer treaty, which was ratified by Great Britain "as a concession to the urgent demands of the United States," says Senator Root, who incidentally remarks that Mr. Clayton held two unratified treaties with Nicaragua as a whip over the British negotiations.

The force of this contention is realized at this time, when the Wilson administration is reviving the Knox treaty, whereby Nicaragua would give to the United States in perpetuity the exclusive right of way for an interoceanic canal across Nicaraguan territory, a permanent lease for a naval station on the Pacific side of Fonseca Bay, and permanent occupation of certain small islands off the Nicaraguan coast. In consideration of these grants the United States is to pay $3,000,000, which Nicaragua will expend on certain designated improvements.

Under the provisions of the Clayton-Bulwer treaty Great Britain gave up its rights under the protectorate over the Mosquito coast and also relinquished its rights to what was commonly supposed would be the eastern terminus of the canal, while the United States sacrificed nothing.

In order to build and control the canal the United States made negotiations with Great Britain to supersede the treaty of 1850 by an engagement that would free us from our treaty obligations which bound us not to obtain or maintain exclusive control over a ship canal across the Isthmus. In 1901 ratifications were

exchanged and the Hay-Pauncefote treaty became operative. This treaty, while it superseded the earlier convention of 1850, yet implied the nonfortification of the canal and specifically provided that the canal shall be free and open to the vessels of commerce and of war of all nations observing the rules prescribed for its operation on terms of entire equality, to the end that there shall be no discrimination against any nation or the citizens or subjects thereof in respect to the conditions or charges of traffic or otherwise. It was stipulated, further, that such conditions and charges shall be just and equitable.

The purpose of the construction of the artificial waterway was to facilitate the free movement of the world's commerce and to improve distributive processes by shortening existing trade routes. Our own national interests were to be identical with the world's interests. The commerce of all nations was to be treated on an absolute equality and in harmony with our treaty guaranties, and no discrimination against or in favor of any nation or any national group was allowable.

If the Clayton-Bulwer treaty of 1850 had not been superseded by the Hay-Pauncefote treaty of 1901, neither Great Britain nor the United States could have constructed or have obtained the exclusive control of the canal. But if the waterway had been built by others while the earlier treaty was in force, it would have been open to British and United States ships on equal terms, and the tolls leviable on such ships would have been identical. The purpose of the Hay-

Pauncefote treaty, as Sir Edward Grey declares, was to recover our freedom of action and obtain the right which the United States had surrendered to construct the canal ourselves. "But the complete liberty of action," avers the English diplomat, "consequential upon such construction was to be limited by the maintenance of the general principle embodied in article 8 of the earlier treaty." The "general principle" of neutralization as stipulated in the Clayton-Bulwer engagement was reasserted in the Hay-Pauncefote treaty, and the basis of this neutralization was the rules embodied in the Constantinople convention. The purpose of the Hay-Pauncefote treaty was to facilitate the construction of the canal under the auspices of the United States by removing the prohibitions contained in the Clayton-Bulwer treaty. This is clearly set forth in the provisions of the treaty of 1901, which plainly and emphatically free the United States from its pledge made in the Clayton-Bulwer treaty of 1850 not to control the canal. On the other hand, Great Britain is not relieved of her obligations made in that instrument to forego ownership and exclusive control of a canal across the Isthmus.

The United States then acquired the right of construction and control and Great Britain acquiesced in the abrogation of the prohibition contained in the Clayton-Bulwer treaty; and in consideration of the acquirement of this right the United States bound itself to treat the vessels of commerce and of war of all nations exactly the same—that is, without discrimination, preference, or special privileges. In other words,

the management and control of the canal rests with the United States, subject to the qualifications that the vessels both of war and of commerce of all nations should be placed on a parity and treated with absolute equality. This is the unequivocal meaning of the provision in the Hay-Pauncefote treaty reasserting the "general principle" of neutralization as established in article 8 of the superseded Clayton-Bulwer convention and as embodied in the Constantinople agreement of October 29, 1888.

M. Philippe Bunau-Varilla, who as representative of the Republic of Panama signed the Panama treaty, holds that the basic law of the operation of the canal reposes in the Hay-Bunau-Varilla treaty and not in the Hay-Pauncefote treaty.

Whether or not this claim is well founded, it must be allowed that the title or deed of the canal strip was conveyed to the United States by the instruments of the Panama treaty even as the previous right of the United States to construct the waterway was acquired by the ratification of the Hay-Pauncefote treaty.

"The terms of the Panama treaty," said Secretary of War Taft in 1906, "are peculiar in not conferring sovereignty directly upon the United States but in giving the United States the powers which it would have if it were sovereign." Our rights on the Isthmus respecting the canal issue form the treaty with Panama of November 18, 1903, and these rights, according to every canon of decency and fair play, are subject to the express provisions of the Hay-Pauncefote treaty.

The truth is that Panama granted to the United

States rights, power, and authority over the Canal Zone, so far as the construction and control of the waterway is concerned; that is, we acquired rights to build and maintain a canal under the express terms of a treaty. While we have the sole right to the possession of the canal and the exclusive right to operate it, the titular sovereignty remains in Panama. Moreover, our treaty engagement with Panama is in the nature of a concession, for which we are obligated to pay $250,000 annually, beginning nine years after the ratification of the treaty. This contract scarcely supports the claim of an absolute sovereignty on the Isthmus. Though the new Republic was in a more delicate position with reference to its sovereignty than was Colombia, yet Panama, technically at least, refused to part with its sovereignty absolutely.

But the question is immaterial whether or not sovereignty is lodged actually with the United States, because the Hay-Pauncefote treaty specifically provides for a change of sovereignty in the following language:

"No change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

The United States does not possess rights on the Isthmus superior to the provisions of our treaties. Our rights are strictly treaty rights and are subject to contractual provisions. For practical purposes only may the United States exercise the rights of sover-

eignty over the Canal Zone. The titular sovereignty still inheres in the Panama Government. The practical purposes consist in the building and operation of the canal. The United States exercises or should exercise sovereignty only so far as it may be necessary to make the canal workable, something like the exercise of the sovereign rights of eminent domain by railroads in order to make the carrier system operative. Since the rights which the United States possess in the canal tract arise from the fountain of treaty provisions, we can not divorce ourselves from the obligations which spring from those treaty rights and regulate canal traffic in the same way that we control the strictly domestic and internal commerce of the United States. If it had been our purpose to discriminate in favor of our coastwise shipping, we should have striven by a straightforward course to reserve this right by an express stipulation to that effect.

Our officials, doubtless, were aware that the building of the canal would not have been actualized if we had insisted upon the application of a domestic policy to the canal traffic.

When the first Hay-Pauncefote treaty was considered in the Senate, Senator Bard, of California, sought to amend the treaty by specifically providing for the right to discriminate in favor of our coasting trade. This amendment, which was defeated by a vote of 27 to 43, indicated the disposition of the Senate not to depart from our historic policy to treat the vessels of all nations with absolute equality.

But now, when the waterway is nearing completion, we have the temerity to do by indirection that which we would not propose even by direct negotiation before we had the right to construct the canal.

It is clear, then, that preferential treatment accorded our coastwise vessels commits violence upon our treaties and is therefore not a bona fide transaction, but is mala fide—a breach of national faith.

But it is urged that the United States owns, controls, and has paid for the canal and yet is restricted by treaty from aiding its own commerce in the way that all other nations of the world may do freely in the exercise of their sovereignty.

It can be demonstrated that this is a superficial view which is unsupported by actual facts and conditions.

In her note of protest of November 14, 1912, Great Britain, through Sir Edward Grey, made it plainly understood that the remission of tolls or their payment by our Government would not be objectionable if the remitted moneys would not fall as an additional burden upon the world's shipping using the canal. In other words, our treaty obligations clearly exact that all nations of the world shall receive equal treatment in the use of the transisthmian waterway, and therefore it follows that our vessels must bear their proportional share of the burden of the canal's maintenance.

The United States, then, is within its rights if in granting a subsidy to its own vessels it does not levy the amount of such subsidy directly or indirectly on the foreign shipping of other nations.

Sir Edward Grey properly maintains that we are debarred from granting a subsidy if the method chosen for granting such subsidy has the effect of imposing upon British or other shipping an unfair share of the upkeep of the canal.

The contention of Great Britain is well grounded that the Panama Canal act is discriminatory, because the exemption of our coastwise vessels from any contribution to the operating cost of the canal and to the interest charge imposes upon foreign ships the payment of more than their just proportionate share. Our special commissioner, Prof. Emory E. Johnson, in his exhaustive report, has shown that if tolls were levied equally upon American and foreign vessels it might be possible to make the canal self-supporting in a decade, but he declared that it would not be possible to secure from foreign shipping alone ample revenues to make the canal pay for its own upkeep.

The United States shames its former pretensions for equal and equitable treatment, and not only refuses to rescind its action, which casts aspersion upon its honor, but scorns the reference to arbitration as suggested by Sir Edward Grey in his note.

It should be recalled that the United States has ratified 25 treaties of arbitration with the leading nations of the world. These engagements run for a period of five years, and for the most part are coterminous. The United States now not only disregards the terms of the Hay-Pauncefote treaty and refuses to arbitrate the questions of tolls, but allows the arbitration treaty of 1908 to lapse without re-

newal. Does not this action imperil the world's structure of arbitration? The treaty of 1908 with Great Britain provides that controversies or differences of a legal character and affecting the interpretation of treaties which fail to yield to diplomatic adjustments shall be arbitrated if the questions at issue do not concern the independence, vital interests, or honor of the contracting States and do not concern the interests of third parties. Now, it would seem that the Panama Canal tolls question is within the purview of this treaty and is arbitrable, since in a political sense it does not affect the independence, vital interest, or honor of the contracting parties, though it may concern the interests of third parties.

But a course more honorable even than arbitration would be to repeal the exemption clause of the Panama Canal act. Such action would avoid the denial of solemn asseverations made in our treaties with New Granada (Colombia) in 1846, with Great Britain in 1850 and 1901, with Nicaragua and with Panama in 1903, and, further, would re-enforce the moral primacy which the United States has held as the supporter of neutral rights throughout the world. By submitting the tolls controversy to a judicial tribunal the United States would preserve our self-respect and at the same time promote the cause of arbitration. The repeal of the law, however, would be more salutary, because such action not only would redound to the national honor, but also would foster the ends of international justice.

How fatuous is a policy that causes a breach of the

national faith and quickens the avarice of a class to which the Government already has dispensed an enervating legal monopoly. But even if the toll-exemption provision did not involve the blight of subsidy and actually would benefit the American shipper and consumer, the United States could not make such exemption in favor of its own shipping consistent with national honor. We are precluded from such a course by the most sacred treaty obligations, which bind us not to discriminate against the world's shipping and carrying interests in respect to conditions and charges affecting canal traffic.

To deny the arbitration of the controversy or to refuse to repeal the law, which is as offensive to the American sense of equity as it is to British judgment, would be to enthrone the pocket greed of a group above the finer elements of national righteousness.